NO.

(Court of Appeals Cause No. 36245-7-II)

SUPREME COURT OF THE STATE OF WASHINGTON

STATE ATTORNEY GENERAL,

Respondent,

v.

AMERIQUEST MORTGAGE COMPANY,

Appellant.

PETITION FOR REVIEW

ROBERT M. MCKENNA
Attorney General

DAVID W. HUEY
WSBA No. 31380
SHANNON E. SMITH
WSBA No. 19077
Assistant Attorneys General
Office of the Attorney General
1019 Pacific Avenue, P.O. Box 2317
Tacoma, Washington 98401-2317
(253) 593-5057

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

I. IDENTITY OF PETITIONERS

State of Washington, Attorney General's Office.

II. DECISION FOR WHICH REVIEW IS SOUGHT

Petitioner requests review of *Ameriquest Mortgage Co. v. State Attorney General*, No. 36145-7-II (Wash.Ct.App. Jan. 6, 2009), in its entirety. Appendix A contains a copy of the opinion.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals (COA) erred when it held that the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. § 6801 *et seq.* preempts the Washington Public Records Act (PRA), RCW 42.56?
2. Whether the COA erred when it imposed an affirmative duty to notify persons named in public records that release of the records has been requested pursuant to the PRA?
3. Whether the COA erred when it concluded that any person affected by the potential release of public records has standing to invoke the court's inherent authority to challenge as arbitrary and capricious a state agency's decision to waive discretionary exemptions to public disclosure?
4. Whether the COA erred when it held that the trial court improperly combined the hearing on Ameriquest's motion for preliminary

injunction with the permanent injunction trial in violation of Civil Rule 65?

IV. STATEMENT OF THE CASE

In 2003, the Consumer Protection Division of the Washington Attorney General's Office (AGO), as part of a multistate group of state attorney's general and banking regulators began investigating Ameriquest's marketing and lending practices. During the course of the investigation, Ameriquest voluntarily provided a large volume of documents.

The investigation led to a $325 million dollar settlement with 49 states and the District of Columbia. Washington's participation in the settlement was memorialized by a Consent Judgment that was filed in King County Superior Court on March 21, 2006.

Mindful of its obligations under the PRA, the AGO insisted that the Consent Judgment contain an explicit provision permitting compliance with the PRA while also allowing Ameriquest notice and an opportunity to be heard in the event a request for documents was received. CP at 168.

On February 8, 2007, the AGO received a Public Records request on behalf of Melissa Huelsman, an attorney, asking for "all documents relating to [the] investigation of Ameriquest." CP 164. The AGO

immediately contacted Huelsman to clarify her request and arrange for disclosure of the documents in installments.

After identifying a group of priority documents for initial disclosure, the AGO notified Ameriquest of Huelsman's request and provided it with a list of the documents it proposed to release. The AGO then began redacting personal information consistent with its practices and RCW 42.56.210. Ameriquest filed this action to enjoin the AGO from producing certain documents and the requestor Huelsman intervened.

The trial court denied Ameriquest's motion for a preliminary injunction, but the COA reversed and remanded

V. ARGUMENT

This Court should accept review for the following reasons:

A. The COAs' Holding That the GLBA Preempts the Washington PRA Is Erroneous and Contrary to the Supremacy Clause of the United States Constitution.

1. The GLBA Does Not Preempt State Public Records Laws.

Conflict preemption law is grounded in the Supremacy Clause of the U.S. Constitution. *Crosby v. National Foreign Trade Coun.*, 530 U.S. 363, 388, 120 S. Ct. 2288, 147 L. Ed. 2d 252 (2000). To sustain a claim that the operation of a state statute is preempted because it conflicts with federal law, the "conflict [must be] so 'direct and positive' that the two

acts cannot 'be reconciled or consistently stand together.'" *Kelly v. State of Wash. ex rel. Foss Co.*, 302 U.S. 1, 10, 58 S. Ct. 87, 82 L. Ed. 3 (1937). The COA, having found potential conflict but failing to attempt any reconciliation of federal and state law, erroneously held that the federal law preempted the PRA. This uncritical application of preemption implicates the Supremacy Clause, thereby justifying this Court's review under RAP 13.4(b)(3).

Concluding the AGO is a nonaffiliated third party as defined by the GLBA, the COA held the GLBA "directly conflicts with Washington's PRA" and is therefore preempted by it. *Ameriquest*, slip op. at 13. The court cited language in the GLBA's savings clause: "[The Act] shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of [the GLBA], and then only to the extent of the inconsistency." 15 U.S.C. § 6807(a).

Even putting aside the question of whether the GLBA's savings clause can be construed as a pre-emption clause,[1] the COA reached its

[1] "State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress." *Progressive Animal Welfare Soc'y v. University of Washington*, 125 Wn.2d 243, 265, 884 P.2d 592 (1994) (*PAWS*) (quoting *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 327, 858 P.2d 1054 (1993)). *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543, U.S.L.W. 4021 (2008) ("When

decision without making any effort to harmonize the two statutes. Had it done so, it would have found the two statutes are not incompatible. Indeed, the PRA was intentionally drafted to avoid inconsistency with "other statutes" containing disclosure prohibitions; "[t]he 'other statutes' exemption incorporates into the [PRA] other statutes which exempt or prohibit disclosure of specific information or records." *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 261, 884 P.2d 592 (1994) (*PAWS*).[2] In *PAWS*, this Court held that two disclosure prohibitions created by state statute, but not explicitly enumerated in the PRA, were "other statutes" that could support nondisclosure of public record information. *PAWS*, 125 Wn.2d at 261-64.

While this Court has not previously addressed the specific question of whether a federal statute may be incorporated into the "other statutes" exemption, the plain language of that exemption is not limited only to state statutes. Had the Legislature intended to limit incorporation to only state statutes, it could have done so expressly by simply adding a modifier to the phrase "other statutes."

---

addressing questions of express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' . . . That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States. . . . Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" (citations omitted)).

[2] RCW 42.17 was recodified at RCW 42.56 subsequent to *PAWS* 1994 decision.

By giving the "other statutes" language of the PRA its reasonable and logical interpretation, conflict with GLBA is avoided and no finding regarding preemption is necessary. Absent conflict, the savings language of 15 U.S.C. § 6807(a) can be given effect, the two statutes can be harmonized, and resort to the Supremacy Clause can be avoided entirely.

2. The Personal Information Ameriquest Voluntarily Provided to the AGO Is Covered by a General Exception in the GLBA Regulations That Permits Compliance With State Public Records Laws.

In enacting the GLBA, Congress directed the Federal Trade Commission (FTC) to "prescribe . . . such regulations as may be necessary to carry out the purposes of [the GLBA] with respect to the financial institutions subject to their jurisdiction.[3] 15 U.S.C. § 6804(a)(1). The privacy regulations prescribed by the FTC are at 16 C.F.R. Part 313.

Subpart A of the regulations sets out the privacy notice and opt out requirements imposed on financial institutions. Subpart A has no application to this case because all personal information that Ameriquest provided the AGO was provided under an *exception* to GLBA's notice and opt out requirements. Subpart A is only relevant in this case to show that

[3] As a state chartered and licensed consumer loan company, Ameriquest was subject to the GLBA catch-all enforcement jurisdiction of the Federal Trade Commission because it was not subject to the jurisdiction of any of the other GLBA enforcement agencies enumerated by the statute. 16 U.S.C. § 6805(a)(7).

it prescribes a much narrower and less informative notice and opt out procedure than the one mandated by the COA.

Subpart C contains the exception that expressly allowed Ameriquest to furnish personal information to the AGO "[t]o comply with a properly authorized civil, criminal or regulatory investigation, . . . by Federal, State, or local authorities." 16 C.F.R. § 313.15(a)(7)(ii). For disclosures made under that section the notice and opt out requirements of Subpart A do not apply. *Id.*

Subpart B governs the AGO's redisclosure and reuse of the information provided under the exception in Subpart C, including disclosures required by the PRA. Section 313.11(a) of 16 C.F.R. describes the limits on redisclosure and reuse of personal information obtained from "a nonaffiliated financial institution under an exception"—that is, it sets the limits on the AGO's redisclosure and use of the information obtained from Ameriquest. Under: 16 C.F.R. § 313.11(a)(1)(iii), the AGO may disclose and use the personal information it received from Ameriquest so long as the disclosure and use takes place in "the ordinary course of business" and is done "to carry out the activity covered by the exception under which [the AGO] received the information"—in this case, the consumer protection investigation.

a. Compliance With the PRA Is Within the Ordinary Course of the Business of State Agencies Such as the AGO.

Though 16 C.F.R. § 313.11(a)(1)(iii) provides that personal information received under an exception may be disclosed or used in the "ordinary course of business", the federal regulations do not define that term. The phrase, however, is a common one in the law. Depending on the specific context in which it is used, it is generally understood to refer to practices or transactions that are usual and customary for the actor or for the larger group or category of similar actors carrying out matters of common interest or concern. *See, e.g.*, RCW 62A.1-201(9) ("A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.") Frequently, the term implies that the actions are done in good faith or without knowledge of wrongdoing or prejudice. RCW 62A.1-201(9).

The people have delegated authority to the AGO to enforce the consumer protection laws, but not the right to decide what information "is good for the people to know and what is not good for them to know." RCW 42.56.030. Disclosure of public records under the PRA is a duty imposed on every state and local agency in Washington. RCW 42.56.070(1). It is a duty that inescapably must be part of the "ordinary

course of business" of government agencies in a democratic society to ensure the agencies truly govern with the informed consent of the people.

b. Production of the Public Records of a Consumer Protection Investigation Is a Routine Part of Carrying Out the Investigation.

To determine what it means "to carry out the activity covered by the exception" under 16 C.F.R. § 313.11(a)(1)(iii), it is necessary to define the activity and the actions necessary for its implementation. In this case, the activity is "a properly authorized civil . . . investigation . . . by . . . State . . . authorities." 16 C.F.R. § 313.15(a)(7)(ii). One might argue that carrying out this activity is properly limited to the bare act of investigation: the collection and analysis of evidence, but no more.

Such a cramped view would be nonsensical. It would make the investigation an end unto itself. Taken to extreme, it would mean the information furnished under the exception could not be used at trial, even though one ultimate purpose of all civil investigations of this type is to develop evidence for use at a trial if one is called for. To interpret narrowly the language of the regulation so as to exclude use of the information at trial would contravene the very purpose for the exception.

Enforcement actions under the consumer protection laws serve two fundamental purposes: (1) to bring law violators to justice and to provide redress for injured consumers; and (2) to alert the public, and potential

violators, to the consequences of unlawful business practices. The first purpose is served through public disclosure of evidence at trial pursuant to court rules; the PRA usually is not implicated. The second purpose, however, absolutely requires some form of public disclosure of the underlying facts in each case, which-outside of a court record-would likely fall under the PRA.

Disclosures furthering this second purpose, also advancing the public policy interests that underlie the PRA. *See* RCW 42.56.030 ("The people insist on remaining informed so that they may maintain control over the instruments that they have created."). Public disclosure of investigation records allows citizens to evaluate the competence, judgment and other important qualities of those chosen to serve them.[4]

Given the close public policy connection between consumer protection and the public's right to know, the task of responding to public records requests about an investigation necessarily falls within the actions contemplated by the phrase, "to carry out the activity covered by the exception". Because public disclosure here is to be undertaken both "in

[4] This is not to say that all investigation records will be disclosed automatically in each case. The AGO will continue to exercise independent judgment as to the application of relevant exemptions, mindful that the PRA is to "be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected." RCW 42.56.030. The AGO also will comply with RCW 19.86.110(7), which limits public disclosure of responses to Civil Investigative Demands.

the ordinary course of business" and "to carry out the activity covered by the exception", AGO compliance with the PRA complies as well with the FTC regulations implementing the GLBA.

If allowed to stand, the COA decision would significantly frustrate the public policies behind consumer protection and public records laws. The potential frustration of these important public policies raises an issue of substantial public interest and calls for review by this Court. RAP 13.4(b)(4).

B. The COA Imposes a Mandatory Duty on Agencies to Give Potentially Affected Persons Notice and Opportunity To Be Heard Before Public Disclosure, Contrary to RCW 42.56.540.

The COA instructed the trial court, on remand, to "make reasonable provision for at least attempted notice to all of the Ameriquest loan customers whose information is being sought for public disclosure." *Ameriquest,* slip op. at 8. The court, however, cites to no authority for this instruction to the trial court and provides no guidance as to how the costs of such notice are to be paid.

The PRA does permit an agency to notify persons named in a record or to whom the record pertains that release of the record has been requested. RCW 42.56.540. But that provision is clearly *optional* to the agency unless "the agency is required by law to provide such notice." *Id.*

GLBA imposes a notice and opportunity to opt out requirement on *financial institutions* such as Ameriquest, but that federal requirement does not support the COA's instruction. The GLBA required notice describes a financial institution's general privacy policy and the opt out options pertain to categories of disclosure, not specific information or records.

Moreover, the information the AGO proposes to disclose was provided under an exception, making them exempt from the notice and opt out protections altogether. In the Section-by-Section Analysis provided by the FTC with publication of the final rule, the Commission opined with respect to disclosures made pursuant to an exception, "A customer has no right to prohibit those disclosures or even to know more than that the disclosures are being made 'as permitted by law.'" Privacy of Consumer Financial Information; Final Rule, 60 Fed. Reg. 33,646, 33,667.

Giving these notices is likely to be costly, particularly if it becomes the rule in these cases. It will likely require the party to obtain updated addresses for the loan customers since the present addresses are now several years old. It will likely entail the expense of preparing and mailing notices and the burden of responding to the inquiries from those who have received the notice long after their relationship with the company has ended.

In the absence of any allegation that the agency acted arbitrarily or capriciously in the exercise of its discretionary authority, courts are obliged to refrain from interfering with the decisions of agencies acting pursuant to discretionary authority granted by the Legislature. *Northwest Savings & Loan Ass'n v. Lockwood,* 25 Wn.2d 22, 32 168 P.2d 379, 384 (1946). To do so violates the constitutional doctrine of separation of powers. *See Carrick v. Locke,* 125 Wn.2d 126, 134-35, 882 P.2d 173, 176-77 (1994).

The instruction to the trial court to direct the AGO in the exercise of discretionary power granted to the agency under the PRA raises a significant question of law under the Constitution of the State of Washington as well as involving a matter of substantial public interest. For these reasons, this court should accept review, the criteria set out in RAP 13.4(b)(3) and (4) having been met.

C. The Decision Disregards the Mandate for Broad Disclosure of Public Records and Frustrates the intent of the PRA.

The PRA "is a strongly-worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). Consistent with the policy of broad disclosure, the Legislature crafted "specific *statutory exemptions* from disclosure for those particular categories of public records most capable of causing

substantial damage to the privacy rights of citizens or damage to vital functions of government if they are disclosed." *PAWS,* 125 Wn.2d at 258 (internal quotation omitted). Courts are directed to liberally construe the PRA's disclosure requirements and narrowly construe its exemptions. RCW 42.56.030. The COA decision undercuts the PRA by imposing an unnecessary barrier.

The legislature designed the specific exemptions to protect individual privacy rights and vital government functions. *See PAWS*, 125 Wn.2d at 258. Vital government functions are protected through work product, attorney-client privilege, and other discretionary exemptions.[5] If an agency concludes that vital government functions would not be harmed by disclosure of records that otherwise may fall within one or more of these exemptions, it is consistent with the PRA for the agency to waive the exemptions and disclose the records.[6] Indeed, most exemptions contained

---

[5] The PRA protects vital government functions with specific exemptions, such as those that: (a) preserve agencies' ability to confer freely with their attorneys and protect legal work product, RCW 42.56.540; *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 748-49, 174 P.3d 60 (2007); (b) protect the give and take of deliberations necessary to formulate public policy, RCW 42.56.280; and (c) protect the integrity of criminal or other investigations to ensure effective law enforcement and maintain individual rights to privacy, RCW 42.56.240.

[6] In this case, the requestor sought (among other records) witness statements prepared by AGO investigators. The AGO determined in this instance that release of the notes did not implicate any government interests because the Ameriquest matter had settled, the Ameriquest was no longer operating, and the information was not obtained pursuant to a civil investigative demand. Lacking a vital governmental function to protect, the AGO properly exercised its discretion to release the documents, consistent with RCW 42.56.210.

in RCW 42.56, including those at issue here, do not mandate nondisclosure of public records. Rather, they allow agencies to disclose otherwise exempt records upon a determination that individual privacy and vital government functions can be protected by redacting such information. RCW 42.56.210. That is precisely what happened here.

The PRA establishes a balance between broadly mandated disclosure and targeted protection of private and vital government interests. The COA disrupted that balance by opening the door for any potentially affected person to challenge an agency's decision to waive any discretionary exemptions, thereby inviting private actions intended solely to preclude or delay disclosure of public records. This ruling runs contrary to this Court's direction to liberally construe the PRA's disclosure requirements and narrowly construe its exemptions. *Hearst Corp.*, 90 Wn.2d at 128. *See also* RCW 42.56.030.

1. The Public Has a Substantial Interest in Maintaining Judicial Review as Set Forth in the PRA.

The PRA expressly provides for two types of judicial review. Persons who have been denied access to public records may obtain judicial review of an agency's decision to assert exemptions that *deny* a person the opportunity to inspect or copy public records. RCW 42.56.550(1). To protect against disclosure of specific public records that

"would clearly not be in the public interest and would substantially and irreparably damage any person" or "would substantially and irreparably damage vital government functions," the PRA affords agencies or affected an injunction remedy. RCW 42.56.540. Although not contemplated by the PRA, the COA constructed a new vehicle for affected parties to stop the disclosure of public records: invoke the court's inherent authority to review a claim that an agency's decision to waive discretionary exemptions is arbitrary and capricious. *Ameriquest,* slip op. at 19 (internal citations omitted).

In reaching this conclusion, the COA did not rely on any provision of RCW 42.56. Nor did it analyze whether Ameriquest had standing to invoke the court's inherent authority to challenge the AGO's decision to waive the discretionary exemptions. Rather, the court concluded Ameriquest had standing simply because it would be "affected by the disclosure of the AGO's work product." *Ameriquest,* slip op. at 19.

The COA's decision invites any affected person to preclude or delay the disclosure of public records by forcing the agency to defend its decision to waive discretionary exemptions, potentially in a full trial following discovery. This is directly contrary to the PRA and is an issue of substantial public interest under RAP 13.4(b)(4).**Error! Bookmark not defined.**

2. The COAs' Decision Will Unnecessarily Preclude or Delay the Disclosure of Public Records.

The COAs' holding has the potential to severely undermine the PRA. The decision would allow parties to sidestep the injunction remedy set forth in RCW 42.56.540 and invoke the court's inherent authority to petition for review of an agency's decision to waive discretionary exemptions, with few sidebars in place to challenge the exercise of judicial discretion. There is significant potential for abuse, particularly by those who may wish to avoid or delay public disclosure of consumer complaints and other potentially embarrassing information, even though such disclosure is clearly in the public interest. RCW 42.56.550(3).

Courts are not required to invoke their inherent authority, *Harris v. Pierce Cy.*, 84 Wn. App. 222, 230, 928 P.2d 111 (1996), and in public disclosure matters, courts should hesitate to do so given the potential for unjustified delay and interference with the prompt disclosure of public records. The PRA *requires* prompt disclosure of public records and allows for penalties against agencies failing to comply within a certain timeframe. *See* RCW 42.56.520; RCW 42.56.550(4). The COA has created a potential bottleneck in every PRA case allowing delay in the disclosure of public records that is clearly contrary to the purpose and intent of the statute.

The Court should grant this Petition for Review under RAP 13.4(b)(4), because this case raises issues of substantial public interest that should be determined by the Supreme Court.

3. The Decision Conflicts With Decisions of this Court.

The COA's decision conflicts with decisions of this Court interpreting the PRA and holding that its disclosure provisions shall be liberally construed and its exemptions narrowly construed. In *PAWS* for example, this Court held that agencies and courts violate the PRA by taking action that is the "functional equivalent" of withholding otherwise disclosable public records. *PAWS,* 125 Wn.2d at 260-61. By affording affected parties the opportunity to challenge an agency's decision to waive discretionary exemptions, the result of the COAs' decision is the functional equivalent of creating a general exemption to disclosure in contravention of the Legislature's limited and express exemptions. *See id* at 261. Indeed, this Court noted that the Legislature plainly did not intend for the judiciary "to be wielding broad and malleable exemptions." *Id.* at 259-60.

D. The COA Erred in Holding that the Trial Court Conflated the Preliminary Injunction Hearing with the Hearing on the Merits.

The COA erred in holding that the trial court violated Civil Rule 65(a)(2) by improperly combining the preliminary injunction hearing with

a trial on the merits without giving the parties notice required by the rule. *Ameriquest,* slip op. at 6. Contrary to the COAs' decision, the trial court did not enter a final order on the disclosure issue. *See id.* at 7. Although the trial court denied Ameriquest's motion for preliminary injunction, it did not order the disclosure of the records, other than ordering that the requestor should have access to the index of records. CP 322. The trial court expressly did not order the release of documents containing proprietary information because no such information was subject to disclosure at that time. CP 323. Rather, the trial court ordered the AGO to redact personal information from the records, and provide Ameriquest with a copy of the redacted documents and an opportunity to object. CP 323. Notably, the trial court kept the Temporary Restraining Order in place until the redactions and objections were complete. CP 323.

The COA relied heavily on *Northwest Gas Ass'n v. Washington Utils. & Transp. Comm'n*, 141 Wn. App. 98, 168 P.3d 443 (2007), *review denied* 163 Wn.2d 1049, 187 P.3d 759 (2008) in deciding that the trial court had violated CR 65(a)(2). However, the facts in the *Northwest Gas* case are distinguishable. In *Northwest Gas*, the trial court ordered the agency to disclose the records following the preliminary injunction hearing, thereby finally resolving the merits of the plaintiffs' claims. *Northwest Gas*, 141 Wn. App. at 114. Here the trial court did not order

the release of the documents; rather, it ordered the AGO to redact personal information and provided Ameriquest with the opportunity to object. CP 323. The trial court did not finally resolve the merits.

Unlike the *Northwest Gas* case, Ameriquest did not present offers of proof demonstrating that there were factual issues that required resolution at trial. Ameriquest offered the declaration explaining why proprietary information should not be disclosed, CP 17, but no documents containing proprietary information was contained in the subject records. Ameriquest presented no evidence indicating that disclosure of the records before the trial court would result in irreparable harm to Ameriquest.

VI. CONCLUSION

The COAs' ruling for which review is sought by the State of Washington impermissibly limits the disclosure of public records and merits review by this Court.

RESPECTFULLY SUBMITTED this 5th day of February, 2009.

ROBERT M. MCKENNA
Attorney General

David W. Huey, WSBA No. 31380
Shannon E. Smith, WSBA No. 19077
Assistant Attorneys General

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

AMERIQUEST MORTGAGE COMPANY, Appellant, v. STATE ATTORNEY GENERAL, Respondent.	No. 36245-7-II PUBLISHED OPINION

Penoyar, A.C.J. — During litigation, Ameriquest Mortgage Company (Ameriquest) released a number of confidential customer loan files to the Washington State Attorney's General Office (AGO). The litigation ended in a settlement agreement. Subsequently, a Public Records Act[1] (PRA) request was made to the AGO requesting those confidential files and the AGO's work product regarding Ameriquest. The AGO willingly prepared the documents sought and notified Ameriquest of the proposed disclosure. Ameriquest sought to preliminarily enjoin the production of documents, arguing that (1) a federal act[2] preempted the state PRA and prohibited disclosure of information provided from Ameriquest to the AGO, and (2) the AGO decision to produce their attorney work product was arbitrary and capricious. The trial court

[1] RCW 42.56

[2] Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq.

denied the preliminary injunction; we granted discretionary review. We reverse the trial court's order as it improperly combined the preliminary injunction hearing with the permanent injunction trial. We reverse and remand to the trial court for further proceedings with the following instructions: (1) the loan customers should be notified and have an opportunity to respond; (2) the federal act does preempt the PRA regarding non-public information contained in the customer loan files; and (3) based on the record to date, the trial court was correct to deny a preliminary injunction on the attorney work product issue.

FACTS

In 2003, the AGO, in association with the Washington Department of Financial Institutions, began an investigation under the Consumer Protection Act, RCW 19.86, into the mortgage lending practices of Ameriquest and two related entities. During the course of the investigation, the two Washington agencies amassed a substantial number of documents that can be sorted into three categories.

The first category of information is that received from Ameriquest through discovery. These documents included a number of confidential customer loan files and internal Ameriquest employees' e-mails. The customer loan files included: a customer's full legal name, social security number, driver's license number, date of birth, credit (FICO) score, credit report, monthly income, sources of monthly income, employer's name, employer's address, length of employment, nature of employment, name and age of any children, checking and savings account information, identification of other assets, residential address, residential phone number, and personal wireless telephone number, as well as all terms and conditions of the customer's loan transaction.

The second category of information included documents provided to the AGO by third parties, including information provided by those

filing complaints with the AGO's consumer resource center.[3] The third category includes documents internally generated by the two agencies during the course of the investigation and prosecution of the case.

Two years into the investigation and prosecution of Ameriquest, in November 2005, the lawsuit between Ameriquest and 49 states and the District of Columbia settled for $325 million. The settlement agreement included a provision that "the State [was to] comply with applicable public disclosure laws and promptly provide notice to [Ameriquest] of the request" so as to afford Ameriquest "the reasonable opportunity to assert that the documents subject to the request are exempt from disclosure."[4] Clerk's Papers (CP) at 165.

In February 2007, the Law Offices of Melissa Huelsman filed a request under Washington's PRA, chapter 42.56 RCW, with the AGO, requesting "all records relating to [the] investigation of Ameriquest." CP at 164. The AGO entered into discussions with Huelsman to focus the request and to prioritize the order of document production. On March 1, 2007, the AGO notified Ameriquest of its intent to disclose the information requested, including the confidential documents Ameriquest supplied, by March 15, 2007. The AGO attached a list of documents that it intended to produce, including Ameriquest's customer loan files for 35 Washington citizens and internal e-mail communications of two Ameriquest employees.[5]

---

[3] The parties agree that the second category of documents may be disclosed to the Intervener. Disclosure of only the first and third categories of documents is in dispute.

[4] Ameriquest maintains that despite this clause in the settlement agreement, it only shared the confidential information with the AGO with the belief that the documents would be used by the AGO solely for the purpose of examination and that the AGO would maintain the document's confidentiality.

[5] The AGO did not provide Ameriquest with a copy of the PRA request or any other information

To prevent the immediate disclosure of documents, Ameriquest filed a complaint for injunctive relief with the Thurston County Superior Court on March 9, 2007. Huelsman (Intervener) filed a motion to intervene in the proceedings. All three parties stipulated to, and the trial court entered, a temporary restraining order preventing the release of the disputed documents.

Subsequently, Ameriquest filed a motion for a preliminary injunction. Ameriquest argued that the information the AGO intended to disclose to the Intervener was protected from disclosure by the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. § 6801 et seq., and was also exempt from disclosure under several PRA exemption provisions. Ameriquest argued that disclosure of the confidential customer loan files conflicted with, and was preempted by, the GLBA. Additionally, Ameriquest argued the necessity of judicial review for the AGO's decision to waive exemptions available under the PRA. Ameriquest voiced specific concerns that the AGO's treatment of its confidential documents was not consistent with the AGO's behavior toward similarly situated companies or requests for similar types of documents.

Both the AGO and the Intervener opposed the motion for preliminary injunction. The AGO acknowledged the confidential nature of the documents but argued that the GLBA did not preempt the PRA. The AGO argued that the GLBA did not preempt the PRA based on the exception in the act that permits disclosure "to comply with Federal, State, or local laws, rules and other applicable legal requirements." CP at 187. In the alternative, the AGO argued that even in case of preemption, the AGO's redaction policy for "personal information" as defined by *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978), satisfied the GLBA's

---

about the request.

prohibitions on disclosure. CP at 186-87.

The trial court denied Ameriquest's motion for a preliminary injunction. CP at 320-24. The trial court determined that the GLBA "does not preempt the State's law on public disclosure of documents." CP at 322. Additionally, the trial court found that Ameriquest had "no standing to assert" various exemptions to the PRA on the AGO's behalf. CP at 322. The trial court ordered the temporary restraining order to remain until the AGO completed redaction of the documents in accordance with AGO policy. The documents were to be released to the Intervener upon completion of satisfactory redaction.

Ameriquest filed its petition for discretionary review and emergency motion for stay, and we ultimately granted both. The information and documents in dispute have not been disclosed to the Intervener.

ANALYSIS

We review all agency actions taken or challenged under the PRA, RCW 42.56.030 through 42.56.520, de novo. RCW 42.56.550(3). We stand in the shoes of the trial court reviewing declarations, memoranda of law, and other documentary evidence. *See Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993).

I. CR 65 Violation

Ameriquest argues that the trial court improperly combined the preliminary injunction hearing with a trial on the merits without giving the parties the notice that CR 65(a)(2) requires. The AGO and Intervener argue that the trial court's action was proper and that Ameriquest failed to make a sufficient offer of proof establishing its intent and ability to develop evidence that would likely prove its case at a permanent injunction trial. We agree with Ameriquest.

Civil Rule 65 governs trial court

procedure for obtaining an injunction. The process generally progresses from temporary restraining order to preliminary injunction to permanent injunction. CR 65(a)(2) provides, however, that "[b]efore or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated" with the preliminary injunction application hearing. If a "court does not expressly state that it is consolidating the injunction hearing and a trial on the merits," though, "it may not render a final determination on the merits" at the preliminary injunction hearing. *League of Women Voters of Wash. v. King County Records, Elections & Licensing Servs. Div.*, 133 Wn. App. 374, 382, 135 P.3d 985 (2006). The purpose of this rule, as with its federal counterpart, is to give the parties notice and time to prepare so that they will have a full opportunity to present their cases at the permanent injunction hearing. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981) (applying Federal Rule of Civil Procedure 65(a)(2), which mirrors CR 65(a)(2)).

Ameriquest argues that this case is analogous to *Northwest Gas Association v. Washington Utilities and Transport Commission*, 141 Wn. App. 98, 168 P.3d 443 (2007), *rev. denied*, 163 Wn.2d 1049, 187 P.3d 750 (2008), a recent decision from this court. In *Northwest Gas*, we reversed the trial court's denial of a preliminary injunction under the PRA because "the trial court did not expressly inform the parties that it was consolidating the preliminary injunction hearing with a permanent injunction trial on the merits under CR 65(a)(2)." 141 Wn. App. at 114. We then, for purposes of judicial economy, stood in the place of the trial court and reviewed all materials to determine if, using the proper standards, the party seeking preliminary injunctive relief was entitled to it. *Nw. Gas Ass'n*, 141 Wn. App. at 115. After reviewing numerous documents detailing what factual inquiries the

requesting party would make in preparing their case for a full trial on the merits, we were satisfied that they had met their burden, granted a preliminary injunction, and remanded for trial on the merits. *Nw. Gas Ass'n*, 141 Wn. App. at 127.

It appears that the trial court here similarly conflated the preliminary injunction hearing with a full hearing on the merits without providing prior notice to the parties. First, we note that the trial court used the wrong standard of proof. At a preliminary injunction hearing, a successful applicant must show a *likelihood* of prevailing at a trial on the merits. Here, the trial court ruled that Ameriquest had to "show: a) [a] clear legal or equitable right, b) a well-grounded fear of immediate invasion of that right, and c) that the acts complained of will result in or threaten to result in actual or substantial injury." CP at 322. This standard applies to a permanent injunction hearing. Second, the trial court entered what amounted to a final order on the disclosure issue. The trial court determined that the "Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.* (GLBA), did not preempt the State's law on public disclosure of documents" and determined that "Ameriquest [had] no standing to assert the intelligence information and investigative records exemption, RCW 42.56.240," or other exemptions under State public disclosure laws. CP at 322. Following these findings, the trial court ordered, subject to redaction, the release of documents the Intervener sought. Based on these irregularities, we hold that the trial court erred in combining the preliminary and permanent injunction hearings and in issuing a final order. We, therefore, reverse.

We could end our analysis here and remand to the trial court to reconsider Ameriquest's request for a preliminary injunction in accordance with CR 65. To conserve the parties' and the courts' resources, we address issues likely to arise on remand.

II. Notification of Ameriquest Customers

Throughout briefing and oral argument, all parties profess a deep desire to protect the personal information of the individuals whose Ameriquest loan files are at issue. Surprisingly, though, these individuals neither have been contacted nor made aware of this tug of war over their confidential information, nor have they been invited to represent their interests before the trial court.

On remand, the trial court must make reasonable provision for at least attempted notice to all of the Ameriquest loan customers whose information is being sought for public disclosure. The trial court shall also make reasonable provisions for those loan customers wishing to intervene or otherwise be heard. Finally, until the loan customers have had the opportunity to be heard and the trial court has appropriately ruled on the merits of either a preliminary or permanent injunction, the loan customer's nonpublic personal information shall remain confidential.

III. Public Records Act-Preliminary Injunctive Relief

A preliminary injunction serves the same general purpose as a temporary restraining order to preserve the status quo until the trial court can conduct a full hearing on the merits. *Nw. Gas Ass'n*, 141 Wn. App. at 115-16. The "status quo ante" means the "'last actual, peaceable, noncontested condition which preceded the pending controversy.'" *Gen. Tel. Co. of the Nw. Inc. v. Wash. Utils. & Transp. Comm'n*, 104 Wn.2d 460, 466, 706 P.2d 625 (1985) (citing *State ex. Rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 529, 98 P.2d 680 (1940)). At a preliminary injunction hearing, the plaintiff need not prove, and the trial court does not reach or resolve, the merits of the issues underlying the three requirements for permanent injunctive relief. *Tyler Pipe Indus. v. Dep't of Revenue*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982). Instead, the trial court considers only the *likelihood* that the plaintiff

will ultimately prevail at a trial on the merits by showing (1) that he has a clear legal or equitable right, (2) that he reasonably fears will be invaded by the requested disclosure, and (3) the disclosure will result in substantial harm. *Tyler Pipe*, 96 Wn.2d at 792-93. We address each of these three injunctive-relief requirements.

A. Clear Legal or Equitable Right

The GLBA establishes an obligation to protect financial customers' nonpublic information. Each financial institution "shall establish appropriate standards . . . relating to administrative, technical, and physical safeguards to insure the security and confidentiality of consumer records and information." 15 U.S.C. § 6801(b). The GLBA expands consumer protection by requiring that any nonaffiliated third party that receives nonpublic personal information shall not disclose such information to any other person. 15 U.S.C. § 6803(c). It is on this provision that Ameriquest bases its duty to protect the disclosure of information collected by the AGO. Additionally, there is no dispute that Ameriquest has a clear interest in the confidentiality of its business records.

"To establish a clear legal or equitable right, the moving party must show that it is likely to prevail on the merits" at trial. *Nw. Gas Ass'n*, 141 Wn. App. at 116 (quoting *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 154, 157 P.3d 831 (2007)). Here, Ameriquest claims that the GLBA preempts Washington's PRA. This is an issue of first impression in Washington, but to survive the preliminary injunction hearing, Ameriquest must show that it is likely to prove this preemption at a subsequent trial on the merits.

State laws may be preempted by Congress through express preemption, field preemption or conflict preemption. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 265, 884 P.2d 592 (1994). However, "[t]here is

a strong presumption against finding preemption in an ambiguous case and the burden of proof is on the party claiming preemption . . . [s]tate laws are not superseded by federal law unless that is the clear and manifest purpose of Congress." *Progressive Animal Welfare Soc'y*, 125 Wn.2d at 265 (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 327, 858 P.2d 1054 (1993)). Ameriquest argues that the GLBA expressly preempts the state PRA law and mandates nondisclosure of the loan files in their entirety. We agree and hold that the GLBA preempts the PRA in this case.

1. The GLBA Preempts Inconsistent State Law

Congress enacted the GLBA to effectuate its policy that "each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information."[6] 15 U.S.C. § 6801(a). "Nonpublic personal information" applies to "personally identifiable financial information--(i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution." 15 U.S.C. § 6809(4)(A).

The GLBA addresses preemption of state law and preserves only a state "statute, regulation, order or interpretation" that is not "inconsistent" with GLBA 15 U.S.C. § 6807(a). 15 U.S.C. § 6807(b). Therefore, we must determine whether compliance with the PRA by the AGO in this case is inconsistent with the GLBA. If compliance with the PRA is inconsistent the GLBA, then the GLBA preempts the PRA on this point and prohibits disclosure.

[6] "Nonpublic personal information" does not "include publicly available information." 15 U.S.C. § 6809(4)(B).

2. The GLBA's Nondisclosure Provisions

The Act contains two related confidentiality provisions. The first provision prevents financial institutions from releasing nonpublic personal information without providing notice to consumers:

> Except as otherwise provided . . . a financial institution may not, directly or through any affiliate, disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with [15 U.S.C. § 6803].

15 U.S.C. § 6802(a). There is a limited exception to this provision in that a financial institution may disclose nonpublic personal information:

> to comply with a properly authorized civil, criminal, or regulatory investigation . . . by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance or other purposes as authorized by law.

15 U.S.C. § 6802(e)(8).

The second confidentiality provision expressly limits the reuse of information disclosed by financial institutions to nonaffiliated third parties:

> Except as otherwise provided . . . a nonaffiliated third party that receives from a financial institution nonpublic personal information under this section shall not, directly or through an affiliate of such receiving third party, disclose such information to any other person that is a nonaffiliated third party of both the financial institution and such receiving third party, unless such disclosure would be lawful if made directly to such other person by the financial institution.

15 U.S.C. § 6802(c). Ameriquest maintains that this provision applies to the AGO, preempts the PRA here, and prohibits the transfer of information from the AGO to the Intervener. The AGO counters that it is not subject to the GLBA because it is not a nonaffiliated third party, as the statute envisions. The AGO is wrong; it is a nonaffiliated third party and it is subject to the

GLBA reuse restrictions.

3. Nonaffiliated Third Party

The AGO argues that because it is not a financial institution, the GLBA reuse provisions do not apply. Alternatively, the AGO argues that because it is "affiliated" with the Intervener (because the Intervener is a member of the public), the GLBA prohibitions on disclosure are not triggered. These assertions are legally incorrect.

Under the GLBA, a nonaffiliated third party is defined as "*any* entity that is not an affiliate of, or related by common ownership or affiliated by corporate control with, the financial institution, but does not include a joint employee of such institution." 15 U.S.C. §6809(5) (emphasis added). There is no requirement that the nonaffiliated third party provided with the information from the original financial institution also be a financial institution. Instead, GLBA language clearly states that "*any* entity" that comes into possession of nonpublic personal information is considered a nonaffiliated third party and is subject to reuse provisions.

In *Hodes v. U.S. Department of Housing and Development*, 532 F. Supp. 2d 108 (D.D.C. 2008), the United States District Court of Columbia decided a similar issue.[7] Hodes filed a Freedom of Information Act action against the Department of Housing and Urban Development seeking information identifying individuals that held mortgage backed securities under Government National Mortgage Association's (Ginnie Mae) mortgage backed securities program. *Hodes*, 532 F. Supp. 2d at 111. Hodes made the same argument the AGO makes here, namely, that the GLBA does not apply to Ginnie Mae because it is not a financial institution. The court

[7] The AGO does not discuss *Hodes* in its brief other than to provide the case name in a "[*b*]*ut see*" citation. Resp't's Br. at 28.

held that the GLBA's "plain language indicates that 'any' entity may be considered a nonaffiliated third party, not just other financial institutions." *Hodes*, 532 F. Supp. 2d at 115. Additionally, the court noted:

> [T]he practical effect of Hodes's interpretation would be antithetical to the Act's stated purpose, which is, in part, to "insure the security and confidentiality of customer records and information." 15 U.S.C. § 6801(b)(1). If Hodes were correct that the Act's confidentiality provisions were only applicable to financial institutions, nonpublic consumer information could be disclosed to any number of third party entities that would be unbound by the Act's restrictions on the use of that information, *rendering its confidentiality provisions largely meaningless*.

Hodes, 532 F. Supp. 2d at 115 (emphasis added).

We agree with the *Hodes* court. The GLBA's definition of a "nonaffiliated third party" is purposefully broad to better protect nonpublic customer information from those who would misuse it. On this issue, the AGO is situated no differently than Ginnie Mae. We hold that the AGO is a nonaffiliated third party and the GLBA's confidentially provisions apply.[8] This federal provision prohibiting disclosure of information directly conflicts with Washington's PRA and thus, the GLBA's nondisclosure provisions preempt the PRA.

[8] The AGO relies heavily on *Pennsylvania State University v. State Employees' Retirement Board.*, 935 A.2d 530 (Pa. 2007), to argue that disclosure is permitted as the AGO and intervener are "affiliates." This reliance is misplaced. In *Pennsylvania State*, a newspaper requested, under Pennsylvania's Right to Know Act, information on the salaries and service histories of football coach Joe Paterno and other university officers participating in a state-operated retirement fund. *Pa. State*, 935 A.2d at 532-34. The state fund objected to disclosure, citing the GLBA. The court determined that (1) state-operated retirement funds are not financial institutions regulated under the GLBA; (2) individual participants in the plan are not consumers as defined by the GLBA; and (3) that the GLBA had no application to state funds. *Pa. State*, 935 A.2d at 538. The information in *Pennsylvania State* is not of the same nature as here and cannot realistically be compared to the private loan information Ameriquest collected from its customers.

Additionally, the AGO argues that its transfer of information to the Intervener is not prohibited because, as a Washington citizen, the Intervener is a necessary "affiliate" of the AGO and vice versa. This interpretation of "affiliated" would seem to make all citizens of Washington "affiliates" of all state agencies, entitling those citizens to use the PRA to obtain nonpublic personal information from state agencies. Thus, this interpretation runs afoul of the GLBA's specific preemption of inconsistent state law on public disclosure of private, personal information. At least under the GLBA, citizens are not "affiliated" with the AGO.

2. Exception Not Applicable

As noted above, under 15 U.S.C. § 6802(e)(8), a financial institution may release nonpublic personal information to a nonaffiliated third party, as part of an official government investigation, to government regulatory authorities, and "to respond to [the] judicial process." There is no Washington case law interpreting what "to respond to [the] judicial process" means; however, other jurisdictions have interpreted the phrase to encompass discovery requests in civil litigation.

In *Marks v. Global Mortgage Group Inc.*, 218 F.R.D. 492 (S.D.W. Va. 2003), the United States District Court of West Virginia held that disclosure of nonpublic personal information to a plaintiff in a civil action was permissible under the "judicial process" language:

> The court finds that 15 U.S.C. § 6802(e)(8) permits a financial institution to disclose the non-public personal financial information of its customers to comply with a discovery request. The phrase "to respond to judicial process" is syntactically separate and distinct from the phrase "to respond to . . . government regulatory authorities having jurisdiction over the financial institution for examination, compliance or other purposes as authorized by law." *See* § 6802(e)(8). Thus, the "judicial process" exemption is independent from, and in addition to, the exception permitting disclosure to comply with a government regulatory investigation.

Marks, 218 F.R.D. at 496.

The District Court of West Virginia cited the GLBA's legislative history to support its holding:

> [T]he legislative history indicates that the House Bill, which added the privacy protections to the GLBA, envisaged an independent judicial process exception. *See* H.R. 74, 106th Cong. 93, 108-09, 124 (1999) (discussing a judicial process exception without reference to 'government regulatory authorities. . .').

Marks, 218 F.R.D. at 496.

It further concluded that when a party must disclose information under a discovery request, the party is responding to a judicial process. Thus, under the judicial process exception, the financial institution may disclose its customers' nonpublic personal information in response to a plaintiff discovery request. *Marks*, 218 F.R.D. at 495-96.

The West Virginia Supreme Court adopted the District Court's reasoning in *Martino v. Barnett*, 215 W. Va. 123, 595 S.E.2d 65 (2004). It held that there was "no basis for limiting the effect of the exception to discovery as no such limitation to application of the term 'judicial process' appears in the GLBA exception." 215 W. Va. at 130.

The Supreme Court of Alabama also considered the judicial process exception in *Ex parte National West Life Insurance Company*, 899 So. 2d 218 (Ala. Oct. 8, 2004). After considering the clauses' syntax, legislative history, and even Black's Law Dictionary's definition of "judicial process," the Alabama court agreed that "the phrase 'judicial process' in § 6802(e)(8) encompasses a court order." *Ex parte Nat'l W. Life Ins. Co.*, 899 So. 2d at 227.

We agree with these courts and hold that the phrase "judicial process" in 15 U.S.C. § 6802(e)(8) includes a court order entered in civil litigation. Hypothetically, here, the Intervener

could enter into litigation with Ameriquest, begin the discovery process, and gain access to the client files in question through a court order.[9] The *hypothetical possibility*, however, that the Intervener could get the information directly from Ameriquest under a court order is not enough to satisfy us that the Intervener is entitled to the information through a PRA request. The Intervener asks us to make numerous assumptions to reach the conclusion that it would be entitled to the information through a discovery process. Only in *actual* civil litigation may a trial court properly review the merits of the Intervener's requests for production and relevancy of the documents to determine if production is warranted.

Here, there is insufficient information in the record to determine whether the Intervener is entitled to obtain this nonpublic personal customer information directly from Ameriquest, thus, the Intervener may not take advantage of the exception provided in 15 U.S.C. § 6802(a).

3. Effect of Redaction

The AGO indicates that it is redacting the Ameriquest loan files in accordance with AGO policy to protect the nonpublic confidential information in the loan files. Since the GLBA only prohibits release of nonpublic information, this process could take the disclosures beyond the ambit of PRA protections. What information in the loan customers' files is public is a factual question that the trial court will need to address on remand. Certainly any information that is disclosed by county auditor or treasurer records related to any transaction is already in the public realm. On remand, the trial court must address this issue after the loan customers have been given

[9] The Intervener mentions in her brief that she is "making the request for information on behalf of several of her clients from the [AGO's] office rather than making an individual request in each case." Intervener's Br. at 27. She does not explain the type of case she is preparing, the cause of action, or whether lawsuits have been filed.

notice and an opportunity to be heard.

B. Well Grounded Fear of Immediate Invasion of Rights

As we have noted, Ameriquest has a proprietary right to keep its business records private. Further, the GLBA requires it to seek protection of confidential client information. Disclosure of its customers' records to a third party could be an invasion of Ameriquest's proprietary rights, and the posture of the case on remand will likely be such that it will give Ameriquest a well grounded fear of immediate invasion of its rights. Under the preliminary injunction standard, Ameriquest will likely satisfy this second prong. *See Tyler Pipe Indus.*, 96 Wn.2d at 792.

C. Actual or Substantial Injury

On remand, the trial court must determine whether Ameriquest meets the third prong of the preliminary injunction test, that is, it will suffer actual harm if the preliminary injunction is not granted. At oral argument, Ameriquest articulated risk of litigation as potential harm. Because the issue of actual or substantial injury has not been briefed or argued in a meaningful way, we do not further address this issue.

IV. Standing Under PRA

The trial court also denied Ameriquest's preliminary injunction motion for the documents internally generated by the two agencies during the course of the investigation and prosecution of the case. The trial court stated that Ameriquest did not have standing to assert exemptions on behalf of the AGO.[10] Having already determined that the trial court improperly joined the preliminary injunction hearing with a trial on the merits, we review this issue.

[10] Specifically, the "intelligence information and investigative records exemption, RCW 42.56.240, the deliberative process exemption, RCW 42.56.280, or the attorney-client privilege and attorney work product exemptions, RCW 5.60.060 and RCW 42.56.290. . . ." CP at 322.

Ameriquest argues that the trial court misapprehended its request for judicial review of the AGO's decision to disclose the confidential documents. It argues that it was not attempting to assert the PRA privileges on behalf of the AGO, rather it sought judicial review of the AGO's actions in disclosing its attorney work product. The AGO argues that Ameriquest lacks standing to demand judicial review of its actions.

Ameriquest is a party that will be affected by the disclosure of the AGO's work product, and thus, it has standing to challenge the AGO's decision to disclose documents related to it. Ameriquest may also challenge the AGO's decision to waive applicable exemptions. As we stated in *Wilson v. Nord*, "a complainant with standing has a fundamental right to have [an] agency abide by the constitution, statutes, and regulations which affect the agency's exercise of discretion." 23 Wn. App. 366, 373, 597 P.2d 914 (1979). Further, "the court [has the] inherent power to review agency action which is arbitrary and capricious." *Int'l Fed'n of Prof'l and Technical Eng'rs v. State Personnel Bd*, 47 Wn. App. 465, 472, 736 P.2d 280 (1987). Establishing standing to pursue this claim, however, does not necessarily mean that Ameriquest can meet the standard for a preliminary injunction restraining production of the AGO's attorney work product.

To prevail at a trial on the merits, Ameriquest must prove that the AGO's behavior was arbitrary and capricious. Ameriquest claims that through discovery, it will be able to find the necessary information to prove its claim. An "arbitrary and capricious action" is defined as:

> [A] willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.

Int'l Fed'n, 47 Wn. App. at 473 (quoting *Pierce County Sheriff v. Civil Serv. Comm'n for*

Sheriff's Employees, 98 Wn.2d 690, 695, 658 P.2d 648 (1983)). This is an extraordinarily high bar for Ameriquest to meet at trial, as neither party disputes that the decision to disclose the AGO work product was a discretionary decision. Ameriquest notes its suspicion that "the AGO's stubborn unwillingness to exercise those exemptions on its own behalf was . . . likely founded on animus towards Ameriquest," but it cites no actual evidence or expectation that evidence proving arbitrary and capricious behavior will be produced if given the opportunity to conduct discovery. Appellant's Br. at 21. It provides only the possibility that it will discover something that will prove its case.

Without any further showing that Ameriquest will be able to prove its claim at trial, the trial court did not err in refusing a preliminary injunction on these materials and, absent some further order from the trial court, the AGO is free to disclose its work product to the Intervener. Because the case is being remanded and the customers will be allowed to make further factual showings, the trial court may take further evidence or argument on this point and grant a preliminary injunction against this disclosure if some additional evidence of abuse of discretion is presented.

We reverse and remand to the trial court for further proceedings. Initially, the Ameriquest customers whose information is at issue must be notified and given opportunity to present their concerns to the trial court. The trial court must make reasonable provision for contact with these parties. Until the customers have been given a reasonable opportunity to respond, the trial court must protect their nonpublic personal information from disclosure.

The trial court shall also conduct a preliminary injunction hearing using the proper standard. We hold that the GLBA preempts the State PRA where nonpublic personal information is concerned and that the State qualifies as a nonaffiliated third party under the GLBA any time it receives nonpublic personal information from a financial institution under that Act. Redaction may be an acceptable solution but because the GLBA applies, redaction must comply with that Act, not just the PRA. This will necessarily require the trial court to determine, under the GLBA, what information is otherwise publicly available.

Penoyar, A.C.J.

We concur:

Armstrong, J.

Hunt, J.